

IN THE HIGH COURT OF LESOTHO

In the matter between :

R E X

vs

MPHO NICODEMUS MARUMO

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 28th March, 1996.

This is a matter in which the accused was charged with murder before this court it being alleged that the said Mpho Nicodemus Marumo is guilty of the crime of murder in that:

_____ upon or about the 27th day of October, 1989 and at or near Ha Katibana in the district of Qacha's Nek, the said accused did unlawfully and intentionally kill SEZATHO TS'OENE.

After the charge was read to the accused and the accused having entered a plea of not guilty the crown having given a summary of the case P.W.1 Mothembile Nelane (alias Ts'oene) gave evidence to the effect that she knew the accused who is a policeman. She testified that accused had come to her home with one Chere looking for the deceased who was her husband. The people who were looking for the whereabouts of her husband with accused were Sehloho's people and it was at dusk when they came

to her home. They had not found her husband who was, according to her, away at work at Nts'upe's, Qacha's Nek. She told the court asked about the M300-00 she had said she knew nothing about it and Marumo and his companion had then left.

According to the witness, in the morning she had gone to make a report at the chief's place to the effect that the accused and Chere had been to her place looking for deceased in connection with money and had found the chief had not been consulted. Returning from the chief's place in the morning accused and this time Sehloho had gone to her home. Accused had said the witness was to carry her baby to show them where her husband was. She had carried the child and left with them; as they were going to Sehloho's the chief had asked where she was going seeing that she was carrying a child and she had replied that it was to find her husband. The chief had then replied that her husband was at work and a messenger was going to be detailed to fetch him. She had not seen her husband that day.

The following day according to the witness, Sehlóho had said she was to send something for her husband to eat while her husband was at Sehloho's. At Sehloho's she had found her husband with many people. Deceased was swollen on head and face, his hands were also swollen and she had given the deceased tobacco. Back home accused had come with her husband to conduct a search and in the two searches nothing had been found. This time

deceased's one hand was tied and the face swollen. She had been instructed by accused to open the trunk as they were looking for money. They had then left for Sehloho's. They were away for some days. One Makhosolle had come to her to say the deceased was asking for warm water. She had found her husband screaming and being belaboured with a black tyre (presumably police riding switch). The following day Chere had also come to say she was to make deceased warm water and when she got there accused asked deceased about the money while the latter's hands were tied on his back and deceased's head was swollen on the left hand side. Asked if she was deceased's wife she had agreed she was. It was said deceased was to gobble his food and as it was hot porridge this was not possible especially because deceased had blood in his mouth. As the porridge was hot deceased did not finish it. Accused had then said at the sound of a gun he will have finished with the deceased.

Accused and deceased had once more come to her home in company of Sehloho. Accused had a swelling and was bleeding profusely from a wound on the side of his head. He was unable to walk and he had his hand tied behind. Her husband having asked her to open the house she had done so but no money was found; accused had then set down and the deceased lay on his stomach. Accused had then beaten the deceased with the tyre (identified as police button). He was hitting the deceased all over the body with the tyre and kicking him and deceased was

saying: 'Marumo forgive me please take me to gaol other than punish me as you are doing.' At the time of the assault on deceased the chief was not present. At the time of the assault deceased's hands were still tied. Deceased then rolled to below the stoep and Sehloho brought deceased to the forecourt where accused continued beating up deceased.

Majara had then arrived and deceased had said to Majara: father Majara, please intervene I am dying. Majara had intervened and accused said she was to give deceased shoes as he was leaving with him. She had not complied. She did not know where accused was going with her husband. She never saw her husband alive again.

The following day she learned her husband had died. She had not seen her husband's corpse. At Sehloho's, according to the witness, accused had said the witness would wear a mourning cloth.

Cross-examined by Mr. Ntlhoki for the accused the witness denied she had exaggerated anything for what she said was what she knew of. She repeated accused did say at Sehloho's that she was going to wear a mourning cloth. She agreed this had not been mentioned at the P.E. though, then, the facts were fresh in her mind. Put to her at the P.E. she had left many things she said it was possible though this did not mean she was not telling the truth. She knew Ntsikane Poone but could not say whether he was

arrested with her husband. Sehloho Sehloho had raised an alarm that Ntsikane was running away and she had seen accused chase Ntsikane and failing to arrest him. Her husband was, at the time, at Sehloho's arrested and tied. Her husband and Ntsikane were not together. The person who raised an alarm had merely said a person is running away at "Tiping". According to the witness, Ntsikane Poni is the same man who had gone to her home and spoken about the money which accused wanted. When Ntsikane spoke to her husband about this money she had been present as, also, when Ntsikane Poni said the money belonged to Sehloho Sehloho she had been present. Ntsikane said he had come to borrow money as the owners of the money were fighting and Sehloho Sehloho was demanding his money from Ntsikane. Before accused came to her house she could not say whether Ntsikane Poni had been arrested in connection with the money nor did she know that before the arrest Ntsikane had implicated her husband. She had heard that he had done so. She knew that accused came to arrest her husband because Ntsikane Poni had said they stole Sehloho's money with him. When they came to the village she did not see that Ntsikane Poni was handcuffed.

From Qacha's Nek to Lebakeng was quite a distance. She did not agree that accused came to her home in the morning; she also disagreed that accused came with Ntsikane Poni handcuffed. It was not true that when accused questioned her about her husband

Ntsikane Poni had fled. Accused had never come with Poni to her home nor does she know that accused spent the whole day looking for Poni. She agreed that accused enlisted the assistance of the local chief to find deceased. She denied she gave two conflicting statements as to where her husband would be found for she had said her husband would be found at Nts'upe's; her husband had been found at Nts'upe's and died at Katiba's. It was untrue that her husband had hidden himself and run away. She agreed her husband had been brought to the village under arrest but that he had come from Nts'upe's. Put to her her husband was trying to escape she had denied her husband was trying to escape.

Put to her in trying to escape her husband kept on falling and the reason for the injury on his face she denied this saying accused had tied her husband and the while assaulting him. She could not say what happened between Nts'upe and Katiba's as she was not there; all she knew was when accused assaulted her husband while the latter was tied. She did not know that her husband had said he had money on a hill where people relieve themselves. Accused and deceased had disappeared behind the school with Sehloho but she did not know where they were going; Mathaka was also with them. After turning a few boulders money was not found and handcuffs were then released. That the place to which accused took deceased was steep she did not know. That her husband in trying to escape had fallen she did not know. Put to her this is how deceased sustained the wound on side of the

head she replied she had seen the wound in the morning. Further, that the wound was sustained in the morning before accused and deceased went to where counsel had suggested they went.

Regarding what deceased is said to have said that the money was in a tin trunk in her house her husband had said she was to open the door and tin trunk but no money was found. That as money was being looked for her husband made for the door was not true for he had sat down; he had not made for the door and on to the forecourt. It was not true that Sehloho had given chase. She agreed at the time her husband was handcuffed it was while he was being assaulted. That accused also came out and gave chase was not true. She agreed that her forecourt was steep and stony but that at the forecourt it was where accused was assaulting deceased that the latter rolled over. It was also true that her forecourt was lengthy. She disagreed her husband was running away but agreed that her husband's hands were tied behind him. She disagreed her husband had jumped over the forecourt, tripped and fell. She denied her husband had fallen on his head. She said the forecourt over which deceased fell was about a meter and deceased had not been injured as a result of falling over. She disagreed her forecourt was higher than one meter or that it was as high as up to accused's chest. She agreed her husband had been fetched from below by Sehloho Sehloho. It was untrue that deceased had not been bleeding from the mouth. She had seen the blood in the morning at Sehloho's;

it was fresh blood. When her husband fell over it was the 2nd day of his arrest. It was true that on the 1st day accused had taken her husband to Qacha's Nek office. Accused had then brought deceased back to the village but by then he had sustained the injuries. She had seen deceased in the morning and he had injuries. That to and from Qacha's Nek deceased walked while accused was on horseback she did not know. She did not know whether in Qacha's Nek deceased had spent 3 days in a police cell. She could not say whether though normal, deceased would not eat and only wanted Sesotho beer.

As to whether accused wanted to find out if deceased was mishandled thus refusing to eat she appreciated this though the question had to be asked as to the cause of blood on deceased. That accused had persuaded deceased to eat and the latter refused to eat was a matter best known to accused. That accused took good care of her husband by escorting him gently and encouraging him to eat other than taking liquor the witness's reply was she could not understand why accused took care of her husband on the way as he said and assaulted deceased so severely while they were at her home. That her husband on arrival was tired because of the distance and not having eaten she did not know because her husband had not returned to her; all she knew was her husband could not walk and his feet were swollen. It was alright that accused was in course of investigation though the question is to be asked whether accused found what he was looking for. Her

husband had told accused he did not have the money. She wondered how a man with swollen feet could run. Put to her this is why he kept on falling she doubted this saying accused will not be telling the truth if he said her husband kept on falling for accused assaulted her husband in and outside the house. That accused had not assaulted her husband is not true for accused took off his uniform and kept on assaulting her husband - even behind the school. Even if accused did not have a riding whip he had nevertheless beat up deceased with the black tyre rod she had referred to. Accused had assaulted her husband and he was carrying a rifle and a whip. It was the whip with which he beat up her husband.

Accused had learned from her husband that she had 8 children. She maintained accused had said at the sound of a gun he did not know who would work for her 8 children. Accused had said this at Sehloho's. According to his passport deceased had been born in 1948 and she was born in 1952. The youngest child was 3 years old. That when she took the porridge from her husband it was full of blood was true because he couldn't eat it and besides accused had said she was to take it quickly and leave. Put to her deceased's refusal to eat porridge was consistent with his previous tendency not to eat she says her husband ate and did not eat because of the blood. It was because of the blood that he would not eat..

She could not know that at Katiba's accused asked for food for himself and deceased and the latter would not eat. She did not know whether deceased ate porridge and not soft porridge nor did she know whether deceased vomited and also did not know whether her husband died after vomiting. She was concerned with the wound her husband had sustained. Accused had hit her husband with the black tyre even underneath his feet. It was accused who had killed her husband. Majara had come in the course of accused beating up the deceased. She disagreed that in trying to escape from custody deceased had caused his own death for accused was the cause of her husband's death by beating him up.

Questioned by an Assessor the witness had said when accused came to her house there was no greeting as he started assaulting her husband.

Questioned by the court she said when her husband was assaulted she cried and accused had invited her to come and speak to this thing of mine. Her husband had gone out of the house of his own.

P.W.2 Majara Matete's evidence had been that he knew deceased in his lifetime. He also knew the accused as a policeman working at Qacha's Nek. He knew how deceased had died. As he went down into the village one Mokhuts'oane had said: 'there's a man being killed by another.' He had gone down and found the man being assaulted was Sizatho the deceased. He

was being assaulted by the accused with a sjambok. Deceased was lying down with his hands handcuffed at the back and deceased was being beaten up. Asking what the man had done accused said he had deceived him. There were many people around as well as P.W.1. The assault took place outside. Accused was flogging deceased while one of accused's feet on deceased's neck. Accused was not saying anything to deceased but the blows were savage. Asking what had happened accused had repeated that deceased had lied to him. Deceased had then said:

father Matete, help me, this man is killing me.

To his observation deceased had not been wearing shoes. Deceased had gone down below the stoep staggering. Accused and deceased had then gone towards Sehloho's whose money it was alleged was lost. He had not looked at deceased's injuries. He had not met accused and deceased again. He knew deceased's stoep which, at its highest point, is one metre. Deceased couldn't walk and he was staggering this way and that. He had left still handcuffed and had not fallen.

Cross-examined by Mr. Ntlhoki for the Defence the witness had testified that he had said accused stepped on deceased without mentioning the neck and if he said so this could be a mistake. Accused was assaulting deceased's body and he couldn't say what happened before then. He had not noticed whether there were injuries on the head though his head was swollen nor did he notice whether he was bleeding. He couldn't say whether he saw

blood. As to what P.W.1 claimed to have seen the witness said P.W.1 was crying and confused and her observations may have been impaired. His impressions were more reliable. When he saw accused it was not the first time he saw him in the area. He had met accused and deceased at a shop i.e. his cafe and it was when accused was escorting deceased to Qacha's Nek. He had pleaded with accused not to assault deceased though at the time accused was not assaulting deceased. He had said this because it was not deceased who had stolen the money - he said this because there was somebody going about borrowing money - it was Ntsikane Poni. He was borrowing money in order to pay back the money it was alleged he had stolen. He also pleaded with deceased not to run away. He said this because when a person under arrest escapes he is shot. He thought deceased might attempt to escape not that he knew he had attempted to escape. Other than accused sjamboking deceased and stepping on his neck nothing else had happened. Deceased had not rolled over the forecourt stoep. Accused face was swollen but there were no abrasions nor had deceased been dragged. He could not say deceased did not have wounds for he did not scrutinise him. He considered his versions to be the same. Even if he had forgotten certain things this is what he had nevertheless seen. Put to him if there were weals the Dr. would have noticed them the witness said he did not understand why the Dr. did not pick them up.

He knew Malefetsane Letete who was his nephew and chief of

Ha Letete. It was wrong to say that he disputed the chieftainship of Ha Letete. It was wrong to say that he disputed it. He had never appeared before courts making such claims. He did not expect accused as a policeman to report to him for he was not chief. He had never quarrelled with Sehloho and any dispute he had was with Sehloho's father regarding a field. Sehloho was only a child. He had never said accused was to release accused all he said was accused was not to assault deceased and the latter was not to try to ran away. He had given both accused and deceased sweets but it was not to influence any one of them one way or the other. When money was placed on top of the wardrobe Ntsikane and Sehloho's mother were present and it was them who would have stolen the money in his view. He had never said Sehloho's mother having stolen her son's money expelled her daughter-in-law. He could never say that for Sehloho's mother was in Johannesburg already. He had never said Sehloho's mother ate the money with her concubine Malefetsane Letete. Sehloho's mother was about 6 years in 1943. Malefetsane had been born in 1940. He could not recall accused saying he did not wish to get involved in village rumours. Accused was wrong in saying the witness wanted to avenge himself on accused for the latter's failure to follow the witnesses prescriptions. Put to him accused did not assault deceased or at all the witness said the accused was defending himself falsely. He was there when accused assaulted deceased. There were people watching and it may well be they feared a policeman. It had not occurred to him to report

the savage attack. He had done Malefetsane several favours and there was nothing wrong in his failure to report the assault timeously.

P.W.3 `Makopano Tsekela testified that deceased died in 1989 and she had the occasion to meet the deceased before he died and it was the first time he met him. Deceased was in accused's company. Deceased was on horseback and accused was leading it. She had formed the impression that deceased was a prisoner for he was handcuffed with his hands in front. Accused had asked for food for deceased and himself. She had given them food. She gave deceased bread and sour porridge and gave accused bread and eggs. She was frightened because accused had said to her deceased could not walk because of hunger. She saw no swelling on deceased but did notice that he was not wearing shoes. Deceased had had a bite and had vomited.

Marumo Ts'upane and Gauteng had then caught hold of deceased and taken him outside. Deceased could not walk on his own. He was made to lean against a wall and water was asked for. When she came with water accused had said deceased had died. When they arrived accused was holding a stick - it was fresh looking like it had just been broken from the tree. On horseback deceased was sitting straight. It was the first time accused had come to her home.

Questioned by Mr. Ntlhoki for the defence the witness said the stick she referred to was a twig.

Tpr. Mr. Fako testified that he remembered 1989 when he had been stationed at Qacha's Nek. He had known the deceased in his lifetime as well as the accused. He had examined the corpse whose left ear was bleeding. There were scratches on the forehead, arms and buttocks, there were also bruises. He appeared to have vomited from mouth and nose; there were swellings around his hands. He could not remember whether the corpse had shoes on. On the way the corpse had not sustained injuries.

Cross-examined by Mr. Ntlhoki for the defence the witness testified that he was an experienced policeman and had dealt with homicide cases. He could tell the difference between a weal and any other injury and especially that caused by a whip. He had found weals and bruises on deceased. Bruises could also be caused by falling. Apart from the bleeding from the ear he had noticed no other injuries on the head and if there were such injuries he would not have missed them. Apart from falling bruises could be caused by sjamboking. If there had been open wounds that were visible he could have seen them though not if the wounds were internal.

Re-examined by Crown Counsel the witness testified it was possible for the skull to crack without there being an open wound.

By consent the Medical Report was handed in and marked Exh "A" and the Crown then closed its case.

Application to have accused released at end of crown case having been refused the accused gave evidence in his defence.

Accused testified that he remembered the year 1989 when he was a policeman stationed at Qacha's Nek and he remembered arresting deceased. He had first arrested one Ntsikane in connection with M606-00 which belonged to Sehlohlo Sehloho. Ntsikane had made a report to him as a result of which he had left with Ntsikane to confront him with deceased. Ntsikane was handcuffed. He had arrived at Leseling in the evening and it was where Ntsikane fled handcuffed.

The following morning he had gone to Lebakeng to ask the chief to help him arrest the deceased; this was chief Malefetsane. A messenger had accompanied him in company of Sehloho but at deceased's home deceased could not be found. P.W.1 had said deceased was at Ha Katiba but not finding deceased there deceased had been found on the way to Nts'upe's. He had escorted deceased to Lebakeng to confront him with Ntsikane and

deceased was barefoot. When deceased had attempted to flee he had released a rein and tied his hands and kept him at Sehloho Sehloho's. It was at dusk. He had kept deceased at Sehloho Sehloho's because P.W. 2 and Malefetsane were quarrelling. At Sehloho's he looked for Ntsikane but did not find him. In the morning he had been informed Ntsikane had run away handcuffed. He had not arrested him but chose to take deceased to Qacha's Nek. On his way to Qacha's Nek he had met P.W.2 near his shop and P.W.2 had said he was to release deceased as he hadn't stolen the money and the money had been stolen by Sehloho's mother who was eating it with his concubine Malefetsane and he had not complied with the request even when he was given sweets. He had also said he (accused) was not to assault deceased and deceased was not to run away either. He had not arrested Sehloho's mother owing to the ill-feeling between Sehloho's mother and P.W.2. He had arrived late at Qacha's Nek and had kept deceased in police cell for 3 days. Whilst deceased was in police cells he had not assaulted deceased. Deceased had no shoes.

He had left Qacha's Nek with deceased in the morning at 7 a.m. and deceased was walking. On the way and at Tiffa's deceased had complained of hunger. Food had been organised but deceased had chosen Sesotho beer at his expense. They got to Lebakeng at sunset. The road was bad but deceased had not been chased. Deceased had told him he had 8 children. He had a gun

and a blanket in his pack. He had borrowed handcuffs as Ntsikane had escaped with his. He had no other weapon as they were not allowed to use police buttons whilst on patrol as these were used if they were lazing around in offices. At sunset he had asked the chief's messenger to ask deceased to point out where the money was. They had gone to the school with the chief's messenger one Maphaka. Deceased was handcuffed and said the money was underneath the stones. No money was found. He pointed to another stone below and when he tried to lift the stone deceased ran away towards the school where there were cliffs and he fell on stones some of which were slippery and sharp. He fell on his left side and he saw a wound on his left ear. He then stopped the exercise seeing deceased would fall again and it was getting late; deceased had made a lot of noise when he was arresting him and he was struggling and attempting to run away. He had not assaulted deceased. That he assaulted deceased with a tyre as P.W.1 testified was untrue. He went on to say near the school and where money was being looked for he had not seen deceased's wife. He had then gone back to Sehloho's and it was time to sleep while deceased was in his custody. That night at Sehloho's he had not assaulted deceased nor did Sehloho assault deceased. In the morning and at 7 a.m. he had proceeded to where money was going to be pointed out; no money was found and deceased said they were to go to his house. At deceased's home even though a trunk was opened no money was found. That deceased's face was swollen and there was a wound on the left

side of the face was true though his face was not swollen. He had not spent more than 3 days in the village. The wound on left side of the head had been sustained on the 2nd day of the arrest though it was not true that it was on the 3rd day that deceased had blood in his mouth. When money had not been found in the house deceased had pointed at some spot in the house and when he tried to search deceased had ran outside handcuffed, Sehloho had gone out chasing and he had followed. Accused had tripped and fallen below the forecourt. Sehloho had then lifted him up and he had noticed there was blood in his mouth suggesting he had bitten himself. Prior to falling he had had no blood in his mouth. Sehloho had brought deceased back so money could be further looked for. The search had continued in and outside the house. He had not ordered deceased to lie down to be thrashed with a whip. Deceased had not been running away from his assaults. He had not assaulted deceased outside while the latter was lying on the ground. That deceased rolled and fell over the forecourt was not true. Deceased had fallen over the forecourt but it was when he was running away from arrest. The forecourt was as high as up to his breast (indicates and about 1 1/2 metres high). He agreed P.W.2 had arrived and that there were many people present. He denied P.W.2 intervened as he assaulted deceased indiscriminately. That P.W.1 had come as he assaulted deceased on the forecourt he denied nor had he stepped on deceased's body in course of assaulting him. That P.W.2 pleaded with him to stop assaulting deceased he denies. That he said he

was assaulting deceased because the latter had taken him to this place and that place and thus deceiving him because no money was found he denied. He was wearing a brown uniform and its jersey. It was not true he had removed the uniform. He denied he put off the uniform to exert himself in assaulting the deceased. At deceased's forecourt he had not assaulted the deceased. He agreed with deceased's wife that deceased fell over the forecourt. As to P.W.1's evidence, it was a made up story. According to him P.W.2 had seen nothing and it was P.W.1 who saw correctly. He disagreed on falling because the latter knew nothing. Asked whether he agreed with P.W.1 that deceased had a head wound the witness answered in the affirmative. He agrees P.W.1 found him at Sehloho's when the latter had taken porridge there; that deceased could not swallow because his mouth was full of blood he said there was blood but not much. He agreed the porridge was steaming hot and deceased had taken two gulps and said it was too hot. He denied deceased's feet swollen because of the assault on him. He had not assaulted deceased on soles of his feet and the swelling could have been the result of walking a long distance for Qacha's Nek was rather far. If he gave deceased the horse deceased would flee. When they went to Qacha's Nek deceased's hands had been tied backwards i.e. behind him but he had changed and they had been tied frontally. At his home deceased's hands had been tied behind him but at Sehloho's they were tied in front and even when they went to Qacha's Nek. When he left for Qacha's Nek with deceased Sehloho, his wife,

mother and deceased's wife had been present. He got to Qacha's Nek but he was alone. At Leseling deceased had said he was tired and hungry. Leseling being rather far off he had chosen to go to Rakatiba's. Before he got to Rakatiba's he had put the deceased on his horse. He led the horse as he feared deceased might attempt to flee; he also feared deceased might get hurt by falling. On horseback deceased was still handcuffed. At P.W.3's he had found 3 men and had asked for food. As he was about to eat deceased became dizzy. They had caught hold of deceased in an effort to give him fresh air but deceased had vomited causing food to go through his mouth and nostrils. He asked for water but P.W.3 had told them deceased had died. He was then holding a fresh twig about a metre long and when he left Lebakeng he did not have it.

When deceased died he offered a horse for a report to be made in Qacha's Nek and he had himself ridden to Qacha's Nek to make a report and P.W.4 had been detailed to fetch the corpse. He had not examined the corpse with P.W.4 for the latter would not allow that. He agreed the deceased had died of head injuries though he denied causing them. He did not agree deceased sustained injuries in running away and while he (accused) was assaulting the deceased. He denied he had said P.W.1 was going to wear a mourning cloth. He could not say why P.W.1 was saying he had killed her husband for the only thing he did was to handcuff deceased and arrest him. P.W.2 was implicating him falsely because he had refused to listen to him.

Cross-examined by Mr. Ramafole for the Crown he said he detained deceased for one day. He was conversant with the laws relating to detention and was aware the minimum period was 48 hrs which, if he exceeded, an application was to be made to the magistrate for a further 48 hours detention. Put to him another thing he could do was to release the deceased he agreed but said he had not done so. He agreed the detention was outside the law. He had allowed deceased to drink beer en route to Lebakeng; regulations did not allow suspects to drink because they could be dangerous to police. He disagreed he was irresponsible to allow a suspect to drink beer. Towards the chief's place deceased had attempted to escape but he had arrested him and fastened him with a strap. In running away he had sustained no injury and he was in good condition when he got to the chief's place; he had no injuries when he arrested him at Nts'upe's; he was from Qacha's Nek when he sustained injuries. Accused was not injured when he got to the chief's place nor did he hear Mr. Ntlhoki say he was falling and injured.

From Qacha's Nek they had put up at Sehloho's because of a clash between chief Majara and Malefetsane, he did not want to take sides between the chiefs. Put to him and yet he was using Malefetsane's messenger's and reporting himself to Malefetsane the witness agreed saying this was not consistent with a man not taking sides. Put to him the reason he put up at Sehloho's was because he wanted deceased punished he denies. The witness went

on to say that Lerallaneng is a place behind the school and allegedly the place where deceased sustained the injury that killed him; it was about 6.00 p.m. Deceased was still tied and he was pointing out the places and was lifting the stones and it was then deceased fled and fell. It was correct to say that on the scene were himself (accused) the chief's messenger and Sehloho. Put to him according to the tenor of cross-examination of state witnesses it seemed deceased was not tied and after turning a few rocks no money was found and deceased was handcuffed and he tried to run away and he was subsequently untied, the accused replied this was not correct adding the right version was the one he told his counsel. Put to him these were two mutually destructive stories the accused replied the deceased was handcuffed all the time and had been handcuffed after turning a few stones. Put to him deceased did not sustain the injury in trying to run away accused denied this. He agreed with the Dr. that deceased had a 5 cm crack on the skull. Having said deceased did not complain of a headache he changes his mind and says deceased did complain of a headache.

Put to him whether he remembered saying after deceased fell the latter complained of a headache the accused says he remembers saying he complained. Put to him he never said this in his evidence-in-chief the accused agrees he did not say this for he did not think deceased had sustained a serious injury and he did not look like having a serious injury. He says P.W.1 was lying

when she said she saw him assaulting deceased for from the school they had gone to Sehloho's place and at the latter's accused was still handcuffed the whole night and Sehloho was present. He says a complainant helps in the investigation. Put to him his association with Sehloho was so that deceased could be assaulted he denies. At deceased's place Sehloho was present and had been present in all investigations. After suitcases were opened accused denied that he assaulted the deceased. He nevertheless agrees that Sehloho chased deceased when the latter fled and brought him back. He denies when P.W.2 arrived he was assaulting deceased. He denies when P.W.2 intervened he had said deceased had lied to him. Put to him how P.W.2 could have known that accused had not found what he wanted and that deceased was deceiving accused by pointing to several places accused said he did not know. Put to him it was because he told P.W.2 this he denies. He had not obeyed P.W.2 because the latter wanted to use him against Malefetsane by putting up at P.W.2's; he was also saying it was not deceased who stole but Sehloho's mother. The accused nevertheless agrees deceased was deceiving him when he said there was money under stones and at his home in suitcases but this did not make him angry and cause him to assault deceased. Put to him this had not been challenged he says it was.

Cross-examined accused said he had spend 2 days at Sehloho's and had left the next day and during all this time deceased was

in his custody and had not been out of his reach though for a brief while he had left deceased with Sehloho's mother being the occasion when he had heard Ntsikane had run away. Whilst with Sehloho's mother deceased had not tried to flee. Although he had said deceased tried to flee from him and yet when he left him with Sehloho's mother he did not try to flee, he did not find this consistent with a man who was disposed to flee. He had not found deceased with injuries after he had left him with Sehloho's mother. Those who knew how deceased was injured were Maqheka, Sehloho and deceased's wife and he also knew how deceased was injured. Behind the school P.W.1 was absent. He agrees that because deceased was under his care and custody for any harm he has sustained he was responsible. Put to him from Qacha's Nek to Katiba he assaulted deceased he disagrees; that the assault was in concert with Sehloho he also disagrees. That deceased was leading him on a wild goose chase he agrees though he is hesitant to say this the reason being that P.W.2 had said in assaulting deceased he (accused) had said he was assaulting deceased because the latter had deceived him and to agree that deceased was leading him on a wild goose chase would be tantamount to endorsing what P.W.2 testified against him.

Re-examined the accused said he insisted he had not assaulted deceased and that he did not cause the injury on the head; further, that in his presence nobody assaulted the deceased.

Questioned by the Assessor he said perhaps it would have been wiser to have remanded deceased in custody and to carry out his investigations thereafter. Accused also said he did not confront Ntsikane with deceased because Ntsikane had run away. The defence had then closed its case.

In his address to the court and in his heads of argument Mr. Ramofole for the Crown submitted that as far as the wound above the left ear was concerned the Crown had not established the cause of the wound save the story as presented by the accused himself. As to what caused the wound was a matter of inference.

There were inconsistencies in the defence case as presented by counsel and accused concerning, for example, periods of initial arrest. It had also been put to P.W.1 that deceased fell 2 times and sustained injuries to his face. Accused's story was that in attempting to escape deceased had sustained no injuries.

Another inconsistency relates to the school where it was claimed deceased sustained injury behind the left ear. Defence counsel's version in cross-examination was that when deceased turned stones he was not handcuffed and it was only after being handcuffed that he attempted to escape. Against this was accused's testimony that stones turned by deceased who was in handcuffs at all material times. Inconsistencies were attributable to accused giving the impression that in running

away deceased fell. Accused had nonetheless agreed that the arrest was unlawful. If deceased was attempting to escape, he was not escaping from lawful arrest. Deceased had been arrested after Ntsikane had escaped. It was a fact that deceased had lied to accused. He could have admitted that deceased led him on a wild chase these and denied P.W.2's allegations. Accused was quick to deny injuries on deceased because he did not want to be associated with injuries and this is why he said P.W.4 was lying when the latter said he saw injuries on deceased. Accused stratagem was such that injuries on deceased coincided with deceased's escape. Although it had been presented deceased was prone to flee, he had not fled when left with Sehloho's mother and the story that deceased was prone to flee could not be sustained.

The moot question, according to the Crown, was why deceased took accused to several places saying money was here and there.

Mr. Ntlhoki for the defence submitted all that is required of an accused person is to give an explanation as he did not have to prove anything. The crown had not proved the cause of the wound on deceased's head and medical evidence was unhelpful in that it does not say what caused the wound. Crown counsel's version and that of the accused was the same in that both say the wound was caused when deceased attempted to escape, the only difference being whether when deceased fell he was handcuffed or

not. When P.W.2 came on the scene deceased already had the head wound.

According to medical evidence there are no other injuries save the head wound. This contradicts P.W.4's evidence and this was why accused denied P.W.4's evidence.

Mr. Ntlhoki further submitted that it was not the Crown's case that the deceased attempted to escape nor was the accused charged with unlawful arrest. One cannot impute an offence without proving it and murder could not be inferred in a substantive charge. If deceased was arrested after Ntsikane had escaped this defeats the crown case because in the event the arrest would have been within the statutory period of 48 hours. It looked like a new offence was being proved against accused under cross-examination. A court could not decide on a charge not before it. It had not been put to crown witnesses whether or not the arrest was lawful; within 48 hrs and while deceased was under lawful arrest he sustained injuries. On the 3rd day accused was taking deceased to Qacha's Nek to see a Dr. but deceased died on the way. On the way accused had lent or made his horse available to deceased. The court could not make inferences on matters that ought to be proved and actus reas had not been proved. In as much as there were inconsistencies in the defence case, there were such inconsistencies in the crown's case.

According to Mr. Ntlhoki, accused's story was the only one and could not be rejected as inconsistent. P.W.1 was contradicted by P.W.2 that deceased did not fall over the forecourt. The court must go by the crown's evidence before rejecting accused's story. The case was based on suspicion which is hardly enough for a conviction. A number of cases had also been quoted in support.

In reply Mr. Ramafole for the Crown submitted that according to accused's evidence he had taken deceased to Qacha's Nek and there deceased had spent 3 days in police cells and it was only after this period that they headed back. The medical evidence was merely supportive and the post-mortem report was not conclusive evidence and could not prevail in the face of direct evidence. P.W.4 had not been taken to task about his observations as to injuries.

Mr. Ramafole disagreed that for unlawful arrest to prevail it was necessary for the accused to have been so charged for the charge arises out of and flows from unlawful arrest. When a person is charged of murder it is only in the course of evidence that a claim of unlawful arrest is made.

From the onset, I wish to make it clear that in this case the accused has agreed that the detention of the deceased was outside the law. Accused has also not put up the defence of

justifiable homicide by virtue of being a policeman nor has he alleged that his deeds were protected by law. Accused's defence is simply that he did not assault deceased and he is not responsible for the latter's death.

What the court has to decide is whether, in the light of evidence tendered accused is guilty and if so the crime he can be said to be guilty of.

From the evidence, it appears that accused arrested deceased because one Ntsikane Poni had made a report to the accused. When, however, accused having arrested deceased he wanted to confront deceased with Ntsikane the latter has escaped from custody with accused's handcuffs. Because, according to accused, he could not put up at the chief's place because of the rivalry between P.W.2 and chief Malefetsane he had preferred to put up with the deceased at Sehloho's the complainant. In the first place, it is unusual for a suspect to be kept at complainant's place the reason being that there's a possibility of emotions flaring up; apart from this; there is the possibility of the complainant instead of the policeman, extracting information from the suspect.

In this case though, P.W.2 categorically denied there was rivalry between himself and chief Malefetsane and what's strange and not accounted for by the accused is that he consulted chief

Malefetsane and obtained messengers who helped him find the deceased. The question may now be asked why accused persistently wanted the deceased to be in company of Sehloho and even Sehloho's mother.

It was P.W.1's evidence that after her husband was arrested Sehloho had said she was to send something for her husband to eat while her husband was at Sehloho's. At Sehloho's she had found her husband with many people. Deceased was swollen on the head and face as were his hands. Accused had then come with Sehloho and a search had been conducted in which nothing was found. Deceased's hands were tied and his face swollen and then deceased and accused had been away for some time.

According to P.W.1, one Makhosolle had come saying deceased was asking for warm water. She had found her husband screaming and belaboured with a black tyre by what was presumably a police riding switch. It had also been said she was to make deceased warm water and when she got there accused asked deceased about the money while deceased's hands were tied on his back; deceased's head was swollen on the left side. Accused had said deceased was to gobble the porridge she had brought but this had not been possible as the porridge was steaming hot and there was blood in the deceased's mouth.

While accused had denied these allegations, there was also

evidence by P.W.2 that accused had, in fact, assaulted the deceased though as to the wound on the side of the head, only P.W.1 had observed it though she could not say when and by whom it was caused. Accused's evidence in this regard is interesting. In his evidence-in-chief accused had said that near the school deceased in trying to escape had fallen on stones some of which were slippery and sharp and had fallen on his left side and he had seen a wound on his left ear. Crafty and with a fertile imagination, accused was attempting to create or build up a defence here. And yet cross-examined on this particular issue accused having said deceased complained of a headache he changed his mind to say he did not complain of a headache.

The defence counsel pressing the point home put it to accused whether he remembered saying after deceased fell the latter complained of a headache and the accused answered in the affirmative. Put to him he never said this in his evidence-in-chief accused agreed saying it is because he did not think deceased had sustained a serious injury as the deceased did not look like having a serious injury. Well, we now know that the deceased sustained a serious head injury and the course of his death. If the injury, according to the accused was not that serious where and when then did the deceased sustain the serious injury? Put in another way, can it be said that it is true as accused testified that the injury which caused deceased death is the one he sustained near the school when the deceased fell?

For if deceased fell on slippery and sharp ground and was hurt, how could he not complain of a headach or pain?

Whichever way, it does not seem that the injury which deceased sustained when he fell bothered accused. But all this is to be read in conjunction with accused's evidence.

Cross-examined accused had said he agreed with deceased's wife that deceased fell over the forecourt. Compared to P.W.2's evidence he preferred P.W.1's evidence for, as he said, she had seen "correctly." He had also agreed with P.W.1 that deceased had a head wound; also that when P.W.1 found him at Sehloho's when P.W.1 had sent porridge to deceased the latter could not swallow properly because deceased's mouth was full of blood though not much. Interestingly, he had disagreed with P.W.2 because if he agreed with his testimony this would lend credibility to P.W.2's evidence that accused assaulted deceased because the latter had deceived him.

Under cross-examination accused had testified that those who knew how deceased was injured were Maphaka, Sehloho and deceased's wife and himself. He had also agreed that because deceased was in his custody and care at all material times for any harm the deceased sustained he was responsible.

16 years looped the loose end of a chain around an escort's neck with fatal consequences. The majority of the court had convicted the boy for murder on the ground of *dolus eventualis* as, according to the court, the boy had foreseen the possibility of resultant death and was reckless as to the fatal consequences. On appeal it was held as the evidence did not establish that the boy subjectively foresaw the possibility of the deed causing death that the conviction for murder be substituted with culpable homicide.

In *S. v. MTSIHA*, 1970 (3) S.A. 747 (A.D.) murder and culpable homicide were brought under scrutiny by Holmes, J.A. as where, on page 752 he posed the question what happens if A assaults B and in consequence B dies and replied by saying A is not criminally responsible for B's death unless:-

- (a) he foresaw the possibility of the resultant death and persisted in his deed reckless whether death ensued or not; and
- (b) he ought to have foreseen the reasonable possibility of resultant death;

it was said that in (a) the *mens rea* is the type known as *dolus eventualis* and the crime is murder; in (b) the *mens rea* is *culpa* and the crime is culpable homicide.

An intention to kill was described by Williamson, J.A. in *S. v. MINI*, 1963 (3) S.A. 188 (A.D.) at p.192 thus:

"_____ To constitute in law an intention to kill, there need not, however, be a set purpose to cause death or even

a desire to cause death. A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."

The dictum in KOMANE v. VAN DER MERWE, 1941 (2) P.H., K62, reads:

"In the case of a policeman arresting a person, the mere fact that he did the act in respect of which the action is brought at the time and place of arrest cannot by itself bring him within the provision of the section. If defendant was not honestly making an arrest for a crime which he believed to have been committed it seems clear that sec. 30 would have no application to this case. An assault committed after the arrest, when it would have no possible relation to the carrying out of the policeman's duty, would not be covered by the section as it would not be done in pursuance of the Act or the regulation."

I have said that accused has not relied on the relevant section of the Police Act as for in any way protecting his act, and I am of the view that any criminal act committed by the accused has no possible relation to the carrying out of a policeman's duty.

R. v. FOUCHE AND ANOTHER, 1958 (2) S.A. 246 (E.) is a case where police assaulted suspects in order to extract information from them. In the course of judgment De Villiers, J.P. noted at p.248 C

"As I remarked during the argument assaults by the police on prisoners or suspects cannot be tolerated. When such assaults are for purposes of obtaining confessions or admissions or information they are doubly objectionable as being the worst form of third degree methods."

He went on:

"In a recent serious murder trial a confession of the

accused was ruled out by me to be inadmissible as I was not satisfied that it was freely and voluntarily made and not as the results of assaults of a very similar nature as those described in the instant case."

And then the learned judge sounded a note of warning that Judges of his court took a very serious view of assault by police on persons in their power after arrest or detention under suspicion and that the authority of courts would be used to stamp out the evil.

Lastly,

"That it is recognised that the tempers and patience of police officers are often strained near breaking point, but it is part of their training and functions at all times to control themselves and not to attack prisoners - p.248 F."

But apparently culpable homicide is respect of killing in the course of an unlawful assault does turn on accused's state of mind; the question is invariably whether the accused had such a culpable state of mind to render him criminally liable for the homicide. In this particular case, the question is whether the hypothetical reasonable man would have visualised' assuming accused's story to be true, that the fall injuring the deceased skull would have endangered his life? Considering that the surface of the ground was slippery with sharp stones as the accused has said, it has been said fractures of the skull from falls on hard surface are common. But accused's evidence is self-contradictory in this regard and I am loath to believe him when he says deceased was injured when he fell on slippery and sharp stones for, as accused's own story has shown, accused had

taken deceased to several places where he claimed money would be found even before P.W.2 came on the scene. If any evidence petrified and disarmed the accused it was that of P.W.2 and hence accused's denial of evidence he should have admitted. The reason accused denied P.W.2 's evidence was consistent with what accused had been doing to deceased whenever no money was found, i.e. assaulting the latter because he had deceived accused.

It was, in my view, as a result of these assaults that deceased sustained the wound to the head. As accused was holding the deceased outside the law and as remarked in Fouche's case above, accused's temper and patience was strained and near breaking point whenever deceased deceived him and he assaulted the deceased. It appears to me consequently, that accused did have a culpable state of mind to support the charge of Culpable Homicide.

Accused's problem is that he consistently held on to the deceased in circumstances in which he should have released the deceased or had him lawfully remanded; moreover, even when deceased got severely injured accused either did not take this seriously and neglected it or being aware there was such an injury to deceased accused in his zeal to pin down deceased and extract inculpatory information from him continued assaulting deceased thus aggravating the latter's already weak physical condition. In this respect I take note of P.W.2's evidence which

I believed to the effect that as accused delivered savage blows on deceased the latter exclaimed:

father Matete, help me, this man is killing me.'

In my view, the fact that medical evidence does not reveal injuries other than the head injury does not mean that deceased was not assaulted in presence of P.W.2.


As I have shown above, accused was in many ways untruthful and tended to hide the obvious as when he denied that deceased had lead him on a wild goose chase for fear that the admission would justify P.W.2's evidence that he (accused) was assaulting deceased because the latter had deceived him. I have accordingly rejected accused's testimony and believed crown evidence as where it was said though deceased was already injured (P.W.1's evidence) accused kept on assaulting deceased because deceased had deceived him (P.W. 2's evidence).

In LEHOQO v. REX 1981 (1) LLR 163 at p.168 it was said the crown must prove beyond reasonable doubt that the killing of deceased was illegal. I am satisfied the crown has proved beyond reasonable doubt that deceased's killing in the instant case was illegal. In coming to this conclusion the court has applied its mind to the merits and demerits of the state and defence witnesses including the probabilities of the case.

Consequently accused is found guilty of the crime of Culpable Homicide.

My assessors agree.

Mr. Ramafole has informed the court that the prisoner has no previous convictions.



G.N. MOFOLO
JUDGE
25th March, 1996

For the Applicant: Mr. Ntlhoki

For the Crown: Mr. Ramafole

MITIGATION OF SENTENCE

Mr. Ntlhoki for the prisoner has submitted that the prisoner is

- (1) first offender;
- (2) as a result of this case his wife had left him;
- (3) as a result of the offence committed by the prisoner he has lost his job plus any accompanying benefits.

Mr. Ntlhoki has suggested that the sentence passed on the prisoner portion thereof or the whole of it be suspended.

Mr. Ramafole for the crown has submitted that the prisoner's circumstances call for a sentence other than a wholly custodian sentence.

I agree with these submissions and given the circumstances of this case and person of the accused it does not seem that a custodian sentence would benefit the accused.

I was informed by the deceased's wife that she is in an impenious state and I suspect she may not have sufficient funds to sue the accused for loss of her husband.


SENTENCE:

The sentence of this court is four years imprisonment postponed for a period of 3 months provided that during the

period of postponement the accused will have compensated the deceased's wife in the sum of M6,000-00 or 10 head of cattle for the loss of her husband.

This sentence is to be brought to the attention of deceased's wife.

My assessors agree.


G.N. MOFOLO
JUDGE
1st April, 1996